

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HERIBERTO CASTRO-GUTIERREZ,

Petitioner,

v.

DORIS L. SHOCKLEY,

Respondent.

No. 2:21-cv-2128 KJM DB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se. Petitioner challenges a March 10, 2008 conviction in Yolo County Superior Court. Before the court is plaintiff's petition for screening and motion to proceed in forma pauperis. For the reasons set forth below, this court grants plaintiff's motion to proceed in forma pauperis and recommends this action be dismissed.

IN FORMA PAUPERIS

Examination of the in forma pauperis affidavit reveals that petitioner is unable to afford the costs of suit. Accordingly, the request for leave to proceed in forma pauperis is granted. See 28 U.S.C. § 1915(a).

SCREENING

Rule 4 of the Rules Governing § 2254 Cases requires the court to make a preliminary review of each petition for writ of habeas corpus. The court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4, Rules Governing

§ 2254 Cases; Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Otherwise, the court will order respondent to respond to the petition. Rule 5, Rules Governing § 2254 Cases.

The court's records reveal that petitioner previously filed an application for a writ of habeas corpus attacking his March 10, 2008 conviction in Yolo County Superior Court, the same conviction he challenges in the present case. The previous application was filed on September 24, 2012, and was denied on the merits on June 4, 2013. Castro-Gutierrez v. Barns, 2:12-cv-2421 GGH (E.D. Cal.). Before petitioner can proceed with a petition for a writ of habeas corpus, he must move in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider the application. 28 U.S.C. §2244(b)(3). Therefore, this action should be dismissed without prejudice to its re-filing upon obtaining authorization from the United States Court of Appeals for the Ninth Circuit.

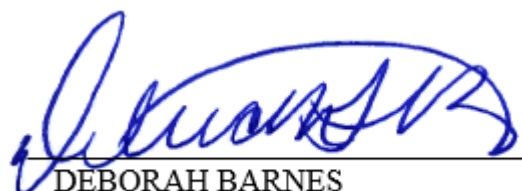
Accordingly, IT IS HEREBY ORDERED that petitioner's motion to proceed in forma pauperis (ECF No. 2) is granted.

Further, IT IS RECOMMENDED that this case be dismissed without prejudice.

These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, petitioner may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Petitioner is advised that failure to file objections within the specified time may result in waiver of the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In the objections, petitioner may address whether a certificate of appealability should issue in the event an appeal of the judgment in this case is filed. See Rule 11, Rules Governing § 2254 Cases (the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant).

Dated: January 31, 2022

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DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE